Citation: UNB v. NB Human Rights Comm. & PNB – 2013 NBQB 148
Date: 20130429

Docket: F-M-8-11
Docket: F-M-9-11
Docket: F-M-10-11

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF FREDERICTON

IN THE MATTER OF an Application for Judicial Review pursuant to Rule 69 of the New Brunswick *Rules of Court*

B E T W E E N:

THE UNIVERSITY OF NEW BRUNSWICK,

Applicant;

- and -

NEW BRUNSWICK HUMAN RIGHTS COMMISSION and PROVINCE OF NEW BRUNSWICK, as represented by the Minister of POST-SECONDARY EDUCATION, TRAINING AND LABOUR,

Respondents.

Date of Hearing: July 21, 2011

Date of Decision: April 29, 2013

Before: Madam Justice Paulette C. Garnett

Appearances:

Richard G. Petrie and Nicholas N. Russon for the Applicant.

Chantal L. Gauthier for the New Brunswick Human Rights Commission, Respondent.

Kelly T. VanBuskirk and Matthew R. Letson for the Province of New Brunswick, Respondent.

GARNETT, J.

[1] Three individuals lodged complaints with the New Brunswick Human Rights Commission (HRC) in which they alleged that the University of New Brunswick (UNB) had discriminated against the UNB women's hockey team on the basis of sex. UNB has made this Application for Judicial Review under Rule 69 of the *Rules of Court* in which it asks the Court to quash two decisions. In the first decision (Decision #1), the HRC recommended that the Minister responsible for the HRC appoint a Board of Inquiry pursuant to subsection 20(1) of the *Human Rights Act*, R.S.N.B. 1973, c. H-11 (the *Act*). In the second decision (Decision #2), the Minister, Martine Coulombe, ordered the New Brunswick Labour and Employment Board to sit as a Board of Inquiry to adjudicate the complaints.

[2] The Respondents, the HRC and the Province of New Brunswick as represented by the Minister of Post-Secondary Education, Training and Labour (the Minister), oppose the application.

Background

[3] Janis Thompson, Sylvia Bryson and Don Davis filed complaints with the HRC. In her complaint, Janis Thompson says, "Since 2000, I have been an active and effective supporter and volunteer for the Women's Program" (Record - F/M/8/11, p. 18). Don Davis says he was "the Head Coach" of the Women's Varsity Hockey team (Record - F/M/9/11, p. 18). Sylvia Bryson was a player on the team (Record - F/M/10/11, p. 18). UNB filed three Records containing approximately 1185 pages each. All parties agreed that many of the documents

were "almost identical" in each of the Applications so they made their suhmissions, hoth oral and written, based on the Record in the Thompson Complaint (F/M/8/11). For the initial part of these reasons, I have used the Bryson Complaint (F/M/10/11).

[4] The Record reveals that beginning in the fall of 2001 and up to the conclusion of the 2008 season, women's hockey was a varsity sports program. In March 2008 UNB announced that "six of the university's fourteen varsity sports teams including men's and women's cross country, men's and women's wrestling, men's swimming and women's hockey had heen reclassified to "competitive sports clubs" effective 2008-09 season" (Record, p. 18). It is the treatment of the women's hockey team and this reclassification of the women's hockey program which the Complainants say amounted to discrimination on the basis of sex.

[5] With respect to Decision #1, UNB says:

> (i) The HRC's decision is in excess of jurisdiction, is incorrect or, alternatively, unreasonable, and in particular where:
>
> (B) The HRC decided that the Applicant had no defence of or exemption for "bona fide qualification" in respect of the alleged discrimination, pursuant to subsection 5(2) of the Act;
>
> (C) The HRC considered the Complaint and all allegations contained therein, and expanded upon, as one of a "continuous nature" and that the Complaint was filed within the prescribed time limit;
>
> (ii) The HRC hreached the principles of procedural fairness and exceeded its jurisdiction in failing to provide sufficient or any reasons for making the recommendation;

(iii) The HRC breached the principles of procedural fairness and exceeded its jurisdiction in failing to disclose to, or permit the Applicant to comment on, all submissions of the Complainant to the Commission.

[6] With respect to Decision #2, UNB says:

In respect of the Minister's decision to appoint a Board of Inquiry:

(i) The Minister's decision is in excess of jurisdiction, is incorrect or, alternatively, unreasonable, and in particular where:

(A) The Minister relied on an incomplete and unreasonable recommendation of the HRC, and the record placed before the Minister by the HRC did not reveal an arguable case of discrimination;

(B) The Minister failed to properly carry out her statutory duty in that she did not reasonably exercise the discretion required under section 20 of the Act; and

(C) The Minister fettered her discretion under section 20 of the Act in failing to make an informed decision in respect of the HRC's recommendation to appoint a Board of Inquiry.

(ii) The Minister breached the principles of procedural fairness and exceeded her jurisdiction in failing to provide sufficient or any reasons for making the decision;

Standard of Review

[7] The standard of review applicable to the decision of the HRC to recommend the appointment of a Board of Inquiry and of the Minister's decision to appoint the Board is that of reasonableness. In *New Brunswick Human Rights Commission v. Province of New Brunswick*

(Department of Social Development) [2010] N.B.J. No. 186, 2010 N.B.C.A. 40 (*Social Development*), Justice Robertson described the standard as follows:

> [36] There can be no doubt that the Minister's decision to accept the Commission's recommendation to appoint a Board of Inquiry is owed deference. By extrapolation, so too is the Commission's decision to make the recommendation.
>
> ...
>
> [41] ... Was there a reasonable basis in the evidence to support the recommendation to appoint a Board of Inquiry? In my view this is the preferred administrative law test. In the civil context, the threshold question would be framed in terms of whether the recommendation and supporting documentation establish an "arguable case", either in law or mixed law and fact. In my view, both the "reasonable basis" and "arguable case" formulations of the threshold test reflect the same deferential standard of review and can be used interchangeably. For ease of reference, I have settled on the test of arguable case. It clearly reflects the understanding that deference is owed to decisions, pertaining to the disposition of discrimination complaints, and that the threshold is "low".

Procedural Fairness

[8] UNB says that the standard of review with respect to questions of procedural fairness is correctness. As I have stated before, I believe it is more accurate and helpful to divorce an analysis of procedural fairness from the mechanisms devised for determining the standard of review. To be more specific, it is more accurate to say that the tribunal must be fair than to say it must be correct. As has been stated often, the concept of fairness varies with the circumstances.

[9] In *Moreau-Berubé v. New Brunswick (Judicial Council)* [2002] 1 S.C.R. 249, Justice Arbour said the following at paragraph 74:

> The third issue requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation. (See generally *Knight v. Indian Head School Division No. 19,* [1990] 1 S.C.R. 653, and *Baker, supra.*)

[10] See also *C.U.P.E. v. Ontario (Minister of Labour)* [2003] 1 S.C.R. 539, 2003 S.C.C. 29.

[11] The distinction is more than one of semantics because the task that the reviewing court is performing is different. As Justice Robertson stated in *Social Development,* supra, at paragraph 31: "The duty of procedural fairness is flexible and variable and depends on an appreciation of the context of the particular statute and the rights affected." As a result, what may be "fair" in one situation may not be "fair" in another. The same tribunal may be found to have been "fair" in doing something in one context but "unfair" in doing the same thing in another context. For this, and other reasons, it is confusing and inaccurate to refer to the standard as being that of "correctness".

[12] It is accurate to say that there is no curial deference.

[13] The question is, was what was done here fair to the parties in all of the circumstances.

[14] In its motion UNB says the following with respect to procedural fairness:

> ...
>
> (ii) The HRC breached the principles of procedural fairness and exceeded its jurisdiction in failing to provide sufficient or any reasons for making the recommendation;
>
> (iii) The HRC breached the principles of procedural fairness and exceeded its jurisdiction in failing to disclose to, or permit the Applicant to comment on, all submissions of the Complainant to the Commission.

Failure to Provide Reasons

[15] The HRC submits that the Case Analysis Report (CAR) "constitutes sufficient reasons" and I agree.

[16] In *Canadian Imperial Bank of Commerce v. Durrer* [2005] F.C.J. No. 1321 (*CIBC*) the Federal Court considered whether the Canadian Human Rights Commission breacbed the rules of natural justice when it failed to provide reasons. It distinguished *Baker v. Canada (Human Rights Commission)* [1999] S.C.J. No. 39 (S.C.C.) at paragraph 29:

> The situation facing the ClBC cannot be compared to that which was facing Ms. Baker. The significant factors related to the Commission's decision and how they affect the CIBC are as follows:

- the nature of the decision here is a "screening process" to determine whether further inquiry is required and not a final determination of the rights of either of the affected parties;

- the statutory scheme does not require that reasons be given for this decision;

- the statute also provides, at s. 50(1), that the CIBC will have ample opportunity to be present and make representations at the final inquiry;

- while the decision is not convenient for the CIBC and will require the organization to present its case to the Canadian Human Rights Tribunal, it will not affect the CIBC's freedom or ability to carry on its business; it is not "critical to their future"; and

- the decision was reached after a consideration of the Investigator's report and further submission by the parties; there was no breach of procedural fairness in how the decision was reached.

[17] The HRC submits that "it seems" the duty of the HRC "is less onerous when a referral is made versus a dismissal". I agree that this does "seem" to be true and for good reason. When the HRC dismisses the complaint at this stage it is "a final determination of the rights ..." of the Complainant. The Complainant is not going to have "ample opportunity to be present and make representations at the final inquiry". A tribunal in these circumstances is making final determinations of fact and law and the Complainant, especially, has the right to know how and why these determinations were made.

[18] This point was made in *Halifax Employers Association v. Tucker* (2008) CHRR Doc. 08-294 (*Halifax*) in which the Federal Court was reviewing a decision of a tribunal to refer a matter to the adjudication. At paragraph 24, the court stated:

> [24] Although the Court agrees that a decision to refer the matter to the Tribunal is still important to the HEA because it leads to a Tribunal hearing with attendant expenses and the possibility of an adverse ruling, it does not carry the same importance as a decision determinative of the merits. This is especially so when one considers that the Tribunal starts afresh and does not normally review the investigation report. The applicant will therefore have an opportunity to set the record straight from the beginning of the new hearing, by presenting its evidence to the Tribunal. Accordingly, this points towards a relatively lesser degree of procedural protection.

[19] I deal with the contents of the CARs in more detail below when considering whether they demonstrate an "arguable case". On the issue of whether the HRC breached its duty of procedural fairness by failing to "provide sufficient or any reasons for making the recommendation", I find that the CARs provided sufficient reasons. More particularly, I find that UNB knows or should know why the HRC made its recommendation.

Failure to Disclose Documents

[20] The HRC admits that there were a number of documents submitted by the claimants subsequent to the delivery of the CAR to the Parties which were not delivered to UNB before the HRC made its decision. The documents (Exhibit 24 - Bryson, p. 584; Exhibit 25 - Thompson, p. 597; Exhibit 25 - Davis, p. 594) were written by each of the individuals as a rebuttal to UNB's response to the CAR. Previous to this, all parties had been provided with the

CARs and were permitted to file written responses. All of them did, and as stated above, the claimants, on receiving the response from UNB filed "rebuttals" to UNB's response. It is these "rebuttals" which UNB did not receive before the HRC made its decision.

[21] The HRC says these rebuttals did not contain "any new facts or arguments" and that UNB knew the case it had to meet, had ample opportunity to meet that case and state its position.

[22] In *Mercier v. Canada (Human Rights Commission)* [1994] F.C.J. No. 361 (F.C.A.) Justice DéCary held that the Canadian Human Rights Commission was obliged to disclose "comments received from the other party" if the comments contain "facts" which are different from those set out in the investigation report.

[23] The HRC says, and I agree, the "rebuttals" here do not contain new facts. In addition, the HRC says, and again I agree, that subject to the requirement that the parties have to know the case they have to meet and an opportunity to meet it, the process has to stop somewhere. An examination of the large number of documents produced in this case is testimony to the fact that each side had the opportunity to present its case and exercised the opportunity.

[24] I find that the failure to provide these documents does not, in the circumstances of this case, amount to a breach of the duty of procedural faimess.

Reasonableness – Arguable Case

[25] *Social Development* was an appeal from a decision in which the Court of Queen's Bench set aside a recommendation of the HRC to the Minister. The HRC had recommended that the Minister appoint a Board of Inquiry to investigate a complaint of discrimination under s. 5 of the *Act*. The Complainants alleged that the Province had discriminated against their son because of mental disability. In dismissing the appeal, Justice Robertson, speaking for the Court, explained the HRC's obligation to determine whether the facts before it amount to "an arguable case" that the claimant may have been discriminated against by the respondent.

[26] Justice Robertson points out that equality is a comparative concept and that complaints under s. 5 of the *Act* "are service driven". In order for the HRC to determine whether a complaint should proceed to an inquiry, it must identify the service which is "available to the public" and identify "the persons who are receiving it to the exclusion of the complainant" (a comparator group).

[27] At paragraph 6 he explains the function of the "reviewing court" as follows:

> 6 ... In the context of "filtering decisions", this translates into a threshold test in which the reviewing court must be satisfied the reasons or record underscoring the recommendation or decision outline a reasonable basis in law and fact for the discrimination complaint to move to the adjudicative stage. In short, the formal reasons or record must disclose an arguable case. Correlatively, a finding of *prima facie* discrimination is unnecessary.

[28] UNB says that the Record does not reveal an arguable case. In particular it says the HRC did not identify "services available to the public", did not identify a comparator group and "failed to perform a differential analysis comparing the Applicant's (UNB) treatment of the Complainant with the appropriate "comparator group"".

[29] The HRC says that the Case Analysis Report which forms part of the Record "discloses" an arguable case.

[30] The Case Analysis Report (CAR) (Record in Bryson F/M/10/11, Volume II, pp. 234-286) was written by a lawyer employed by the HRC and was provided to the HRC and the Parties before the HRC made the decision to recommend that a Board of Inquiry be appointed. In it the writer explains that Sylvia Bryson alleges she was discriminated against on the basis of sex when UNB "continually treated the Men's Varsity Hockey Team (MVHT) in a preferential manner compared to the Women's Varsity Hockey Team (WVHT) and removed its "varsity status"". The writer also reports that UNB says changes were made to the Athletic Program for budgetary reasons and the changes were made on the basis of 14 objective criteria not on the basis of sex (Record, p. 386).

[31] Bryson says the "objective criteria" were, in themselves, discriminatory.

[32] Beginning at page 239, the CAR explores the question of whether "varsity status" is a service available to the public and after reviewing relevant case law and the facts as

presented by the parties concludes by recommending that the HRC "not dismiss the complaint at this stage of the proceedings".

[33] UNB says that this is inadequate.

[34] Beginning at page 248, the CAR considers the question of what is the appropriate comparator group. It states the two groups proposed by the parties: Bryson – male varsity hockey team, UNB – Tier 2 teams. It then reviews the law and arguments presented in support of the positions. At page 251 the writer states that "Both of the comparator groups … could be successfully argued at the Board of Inquiry" and recommends that "the Commission not make a decision regarding the appropriate comparator group as it is an issue that should be decided by the Board of Inquiry …" Again UNB says that this is not adequate.

[35] Beginning at 252 the writer summarizes the evidence, allegations and arguments under the following headings:

1) Since 2004 through to March 2008, the Respondent (UNB) has continually treated the Women's Hockey Team unfairly as compared to the Men's Varsity Hockey Team:

   (a) Funding, Budget, Scholarships & Fundraising (p. 253);

   (b) Team and program promotions (p. 265);

   (c) Access to therapy (p. 267);

   (d) Access to equipment (p. 268);

   (e) Access to dressing rooms (p. 271).

2) The criteria used by the Respondent (UNB) to make its March 12, 2008 decision were unfair and discriminatory toward the Women's Hockey Team:

   (a) Present alumni involvement (p. 277);

   (b) Past success at AUS (Atlantic University Sport) and CIS (Canadian Interuniversity Sport) (p. 277);

   (c) Recruited student athletes (p. 278);

   (d) Expense Revenue Balance (p. 278);

   (e) Past academic success (p. 279);

   (f) Attendance (p. 279)'

   (g) Community interest (p. 280);

   (h) History and tradition (p. 280);

   (i) Strength of sport in New Brunswick (p. 280);

   (j) AUS competition level (p. 281);

   (k) Media coverage (p. 282).

3) The effects of removing varsity status of the Women's Hockey Team was more felt by the Women's Varsity Hockey Team than any male team who lost their varsity status.

[36] The summaries under these headings are detailed as to the facts presented and the argument or position of the parties. UNB says that this analysis is not enough.

[37] I do not understand the reasons in *Social Development* to require that the HRC come to conclusions on the issues referred to. I understand it to require that the record disclose an arguable case. In order for the record to do that, it must demonstrate that the HRC has

considered the essential issues, that is, that there is a service or services which are "available to the public" and that there are "persons" receiving those services to the possible exclusion of the claimant (a comparator group). The CAR deals explicitly with those issues as outlined above. It also deals at length with the facts as presented by the Parties relating to the treatment of the teams in question. It does not, nor is it required to, come to conclusions regarding those facts.

[38] I am satisfied that the record in the Bryson Complaint, particularly the CAR, form "a reasonable basis in law and fact for the discrimination complaint to move to the adjudicative stage". In other words, I find that the decision of the HRC meets the standard of reasonableness.

Bona fide qualification

[39] UNB says the HRC "decided" that UNB "had no defence of or exemption for "bona fide qualification" in respect of the alleged discrimination" on the basis of subsection 5(2) of the *Act*. It relies on *British Columbia (Public Service Employee Relations Commission) v. The British Columbia Government and Service Employees' Union*, [1999] 3 S.C.R. 3 ("*Meiorin*") and *British Columbia (Superintendant of Motor Vehicles) v. British Columbia (Council of Human Rights),* [1999] 3 S.C.R. 868 ("*Grismer*"). The headnote in *Grismer* reads, in part, as follows:

> The Meiorin test applies to all claims for discrimination under the B.C. Human Rights Code. It requires those governed by human rights legislation to accommodate the characteristics of affected groups within their standards. Once a plaintiff establishes that the standard is prima facie discriminatory, the onus shifts to the defendant to prove on a balance of probabilities that the

> discriminatory standard is a bona fide occupational requirement or has a bona fide and reasonable justification. The defendant must prove that: (1) it adopted the standard for a purpose or goal rationally connected to the function being performed; (2) it adopted the standard in good faith, in the belief that it is necessary for the fulfilment of the purpose or goal; and (3) the standard is reasonably necessary to accomplish its purpose or goal, because the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship, whether that hardship takes the form of impossibility, serious risk or excessive cost. Accommodation ensures that each person is assessed according to his or her own personal abilities rather than presumed group characteristics. Failure to accommodate may be shown by evidence that the standard was set arbitrarily, or that individual assessment was unreasonably refused, or in some other way. If the policy or practice is reasonably necessary to an appropriate purpose or [page870] goal, and accommodation short of undue hardship is incorporated into the standard, the fact that the standard excludes some people does not amount to discrimination.

[40] UNB informed the HRC that its decisions with respect to its Athletic Program were made for budgetary reasons and "to maintain a competitive sports program". UNB says its decisions were based "on 14 objective criteria". The Complainants argued that the criteria were not objective and were in themselves discriminatory.

[41] The issue is discussed in the CARs (Bryson – pp. 242-248). At page 248, the writer states that the information provided by UNB "appears not to be sufficient to establish a *bona fide* qualification" and recommends that the complaint not be dismissed on this basis.

[42] UNB suggests that because of the wording of s. 5(2) of the *Act* that a Board of Inquiry "may not have jurisdiction to permit a *bona fide* qualification". No case law is cited to support this assertion.

[43] Section 5(2) of the *Act* permits the Commission to determine the issue ("as determined by the Commission") but does not require it to.

[44] The CARs demonstrate that the facts and law were presented for the HRC's consideration on this issue and it meets the threshold test of reasonableness.

Thompson Complaint and Davis Complaint

[45] As stated above, up to this point I have referred to the Bryson Complaint because there is a significant difference between her complaint and the other two. Bryson was a female hockey player on the varsity team. Thompson was a volunteer who helped the Women's Program and Davis was the Head Coach. UNB says that neither Thompson nor Davis are aggrieved persons under the *Act*. UNB points out that neither was a player on the team or would, under any circumstances, be eligible to play on the team.

[46] The CAR in the Davis Complaint deals with this issue beginning at page 4 (Record, p. 237). The writer points out that Davis is not and was not a student at UNB and was not a member of the Women's Hockey Team. She then refers to a number of cases which have given a wide interpretation to the phrase "any person claiming to be aggrieved" and reviews the position of the parties. She then concludes:

> 19. Based on the information above, there is not sufficient information to refute the Complainant's assertion that he is an aggrieved person as defined under the Act. Therefore, it is

> recommended that the Commission consider the Complainant as an aggrieved person under the Act and to determine the appropriate next step in his complaint, which could include dismissal, assignment to conciliation, or the recommendation to appoint a Board of Inquiry to determine the matter.

[47] The CAR in the Thompson Complaint deals with the issue at page 4 (Record, p. 236) and again the writer points out that Thompson is neither a student nor a player. She then summarizes all the services that Thompson has performed as a volunteer in support of women's hockey. She again refers to the cases which have given a wide interpretation to the words "persons aggrieved" and summarizes the positions. She concludes as follows at page 239 of the Record:

> 21. Based on the information above, there is not sufficient information to refute the Complainant's assertion that she is an aggrieved person as defined under the Act. Therefore, it is recommended that Commission consider the Complainant as an aggrieved person under the Act and to determine the appropriate next step in her complaint, which could include dismissal, assignment to conciliation, or the recommendation to appoint a Board of Inquiry to determine the matter.

[48] I am informed that the CAR was completed before the publication of *Social Development*. As stated above, Justice Robertson has said that the HRC's primary obligation is to determine whether there is an arguable case that the complaint falls within the parameters of section 5 of the *Act*. One of the problems in the case before him was that the HRC had not identified the service which was alleged to be available to the public nor had it identified the person or persons who were receiving it to the exclusion of the claimant.

[49] In this case, the CAR reveals that the HRC did consider the question of whether there was a service available to the public and whether there were persons receiving it to the exclusion of the claimants. The issue of comparator group is discussed and two possible comparators are identified.

[50] On the issue of whether the particular claimants fit within section 5 however, the discussion is confined to whether they fit within the meaning of "any person claiming to be aggrieved" in section 17 of the *Act*. The CAR recites the various ways in which both Thompson and Davis were adversely affected by the conduct of UNB however there is no analysis with respect to the other requirements of section 5. For example, were Thompson and Davis part of the "public" to which the service was available? What persons were receiving the service to the exclusion of Thompson and Davis – other coaches? – other volunteers? What is the comparator group? On which of the enumerated grounds were they discriminated against?

[51] There have been cases in which courts have held that aggrieved person should be given a wide interpretation. The CAR refers to *New Brunswick District No. 15. v. New Brunswick (Human Rights Board of Inquiry)* [1989] N.B.J. No. 844 (Attis) and *University of Saskatchewan v. Women 2000*, 205 SKQB 342.

[52] In *Social Development*, Justice Robertson emphasizes that the HRC must determine that the complaint should proceed on the basis of the requirements of section 5. Section 5 must be triggered and the reviewing court must be satisfied that the reasons and/or the record reveal an arguable case.

[53] The conclusion in the CARs that "there is not sufficient information to refute the Complainant's assertion that he [she] is an aggrieved person" fails the "threshold test" of whether there is a "reasonable basis in law and fact ... to move to the adjudicative stage" because it does not analyze whether these particular complainants also satisfy the requirements of section 5. The result is that the net is cast too widely. There are, no doubt, many people or groups of people who could demonstrate an adverse affect as the result of government policies but they do not satisfy the requirements of s. 5.

[54] Therefore, I conclude that in the case of Thompson and Davis the record does not reveal an arguable case.

Disposition

[55] The recommendations of the HRC and the Minister in the Thompson Complaint and the Davis Complaint are removed into this Court and quashed.

[56] The application by UNB in the Bryson Complaint is dismissed.

[57] Since all parties dealt with the complaints together and since success was divided, there will be no costs.

Paulette C. Garnett

Paulette C. Garnett, J.C.Q.B.